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reply to writer

March 13, 2002

VIA HAND DELIVERY

Ms. Kristi Izzo, Secretary
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Re: Matter of the Consultative Report on the Application of
Verizon New Jersey, Inc. for FCC Authorization to Provide
In-Region, InterLATA Service in New Jersey
Docket No. TO01090541

Dear Secretary Izzo:

This is on behalf of the New Jersey Cable Telecommunications Association ("NJCTA") regarding the response of Verizon New Jersey Inc. ("Verizon NJ"), submitted yesterday, to the Board's order of March 6, 2002 in *In the Matter of the Board's Review of Unbundled Network Element Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.* -- Docket No. TO00060356 ("UNE Rate Order").

At paragraph 82 of the UNE Rate Order, the Board directed "Verizon NJ to submit a verified statement no later than March 12, 2002 indicating whether Verizon NJ waives its right to challenge the Board's UNE rates in any court or before this Board . . .", among other things. Verizon NJ expressly declined to waive any rights to "challenge the Board's UNE rates in any court or before this Board." Verizon NJ noted that it has not made any determination of whether or not it will mount such a challenge. Verizon NJ claims that because of contingencies outside the purview of the Board's UNE Rate Order it *cannot* waive such rights. Verizon NJ argues that

it may want to change one of more of the rates because of a change in costs or a change in the law. Verizon NJ also specifically points to the FCC's recently initiated Triennial Review of UNEs, and "a case currently pending before the United States Supreme Court" as matters which may materially affect the TELRIC methodology. It claims that "decisions in either of those proceedings could require that the Board re-examine the matters before it in this case."

Only a brief consideration of Verizon NJ's position reveals that none of the contingencies cited precludes Verizon NJ from agreeing to waive its rights to mount a challenge to the UNE Rate Order. All of those contingencies relate to potential events which may or may not ever occur, and therefore could not form the basis for any challenge to the UNE Rate Order. Such a challenge would necessarily be based upon the assertion that the Board committed error in its conduct of the UNE rate proceeding, or in the evaluation of the evidence before it, that is, on events which have already occurred. Simply, a waiver of Verizon NJ's right to challenge the UNE Rate Order, promulgated, as it must be, on the *current* state of the law and facts before the Board, would not foreclose Verizon NJ from bringing *changed circumstances* to the attention of the Board to review the efficacy of the UNE rates set out in the UNE Rate Order.

By definition, the *potentially* changed circumstances cited by Verizon NJ would not require a *re-examination* of the matters before the Board in the UNE rate proceeding, since those circumstances were not before the Board in the consideration of its UNE Rate Order.¹ We emphatically note that the only reason for Verizon NJ to preserve its right to challenge the UNE Rate Order is to assert that the Board committed error in the UNE rate proceeding on the record before it. While Verizon NJ now claims that it has not determined whether it will mount such a

¹ To be sure, the Board did find, as it was required under the current state of the law to do, that "until the Supreme Court renders its decision regarding the FCC's TELRIC pricing rule, rates for UNEs should be based upon the existing TELRIC principles." UNE Rate Order, p. 266, paragraph 1.

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challenge, its strong inclination to do so was publicly articulated in a Verizon NJ press release.²

Under the circumstances, Verizon NJ's arguments are nothing short of preposterous.

As we said in support of AT&T's motion for the Board to require that Verizon NJ express its intentions with respect to the waiver of any rights to challenge the UNE Rate Order³:

The Board's concern of a subsequent challenge was expressed in its Consultative Report issued on January 14, 2002, wherein the Board stated:

A Verizon challenge to the validity or effective date of the rates or any attempt to increase or otherwise change these rates, will raise the question of whether the modified rates are TELRIC compliant, thus not permitting the Board to find compliance with Checklist Item 2.

In comments filed with the FCC, several parties, including the NJCTA, raised the specter of a possible challenge to the UNE rates set out in the Summary Order (once the Board issues a final order to which a challenge may be mounted), and that the mounting of such a challenge would violate an express condition of the favorable Consultative Report the Board issued.⁴ Such concern was (and is) heightened because such a challenge can now be mounted after the time by which the FCC is required under the law to act. VNJ's response is particularly telling and demonstrates the disregard it holds for the Board's express condition. VNJ said:

The long distance incumbents [including NJCTA] argue that the BPU has still not issued a final UNE rate order, and, as a result, Verizon can still challenge the new rates. See AT&T at 9; WorldCom at I; see also NJCTA at 6-7. But this is *irrelevant* given that there is simply no question that Verizon has a *current* legal obligation to implement the new rates, or that it has actually done so.

(citations in original; italicized emphasis added)

While it may be argued as to whether VNJ has a legal obligation to implement rates prior to the issuance of a final order, it is clear that VNJ is saying that whatever obligation it does have, such is only applicable *currently*, clearly implying that once a final order is issued it is free to mount whatever challenges it wishes to the UNE rate schedule. That eventuality would have the clear effect of

² See *Comments of the New Jersey Cable Telecommunications Association to the Application of Verizon New Jersey Inc. (Verizon NJ) for Approval to Provide In-Region Long Distance Services*, FCC Docket No. 01-347, filed on January 14, 2002, p.7 fn15. Exhibit B to that filing is attached here for the Board's consideration.

³ See *Letter on Behalf of the New Jersey Cable Telecommunications Association to Kristi Izzo, Secretary, Board of Public Utilities* dated March 1, 2002 in Docket No. TO01090541.

⁴ *Consultative Report of the New Jersey Board of Public Utilities*, January 14, 2002, p. 24.

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vitiating the significant condition of the Board's Consultative Report. That VNJ characterizes the fact that it can still challenge the new rates as ***"irrelevant"*** demonstrates VNJ's lack of any regard for that condition.

Verizon NJ's lack of regard for the condition attached to the favorable consultative report submitted by the Board to the FCC is made abundantly clear by its express repudiation of that condition. Verizon NJ's actions have placed the Board in an untenable position. Under the circumstances, the Board has no choice, at this point, than to notify the FCC immediately that the essential condition of the favorable consultative report is not met, and that Verizon NJ has no intention to meet it, and, thus, the consultative report should not now be considered as supporting Verizon NJ's application.

Respectfully submitted,

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Attorneys for New Jersey Cable
Telecommunications Association

cc: Attached Service List (via email and regular mail)